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In The

Supreme Court of the United States

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD.; and THOMAS R. CAMBRIDGE,

Petitioners,

v.

OKLAHOMA TAX COMMISSION; and THOMAS E. KELP, JR., JERRY B. JOHNSTON, and CONSTANCE IRBY, tax commissioners, all in their official capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Oklahoma law that requires the withholding, for state income tax purposes, of five percent of all oil and gas royalties paid to non-residents but exempts royalties paid to residents violates the Privileges and Immunities Clause of Article IV of the U.S. Constitution?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners:

Petitioner Panhandle Producers and Royalty Owners Association ("PPROA") is a non-profit trade association that is organized under the law of the State of Texas and operates from its principal place of business in Amarillo, Texas. PPROA represents independent petroleum producers, support companies, and royalty owners in the Texas Panhandle, western Oklahoma, and southwestern Kansas.

Petitioner Cambridge Producers, Ltd. ("Producers") owns oil and gas royalties in Oklahoma, operates from its principal place of business in Amarillo, Texas, and is a member of PPROA.

Petitioner Thomas R. Cambridge is a General Partner of Producers. Mr. Cambridge is a resident of Amarillo, Texas.

Pursuant to Rule 29.6, PPROA declares that it has no parent or publicly held company owning 10 percent or more of PPROA. Cambridge Producers, Ltd. is owned in whole by Thomas R. Cambridge and Norma J. Cambridge and is managed by general partner Cambridge Production, Inc., a family-owned subchapter "S" corporation. Pursuant to Rule 29.6,

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Cambridge Producers, Ltd. and Cambridge Production Co. declare that no parent or publicly held company owns 10 percent or more of either Cambridge Producers, Ltd. or Cambridge Production Co.

Respondents: Respondent Oklahoma Tax Commission ("OTC") is a political subdivision within the State of Oklahoma and is responsible for implementation of Oklahoma tax laws. Respondents Thomas E. Kemp, Jerry B. Johnson, and Connie Irby are duly seated members of the OTC.

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PETITION FOR WRIT OF CERTIORARI

The Panhandle Producers ("PPROA"), Cambridge Producers, Ltd. ("Producers"), and Thomas R. Cambridge (hereafter together "Nonresident Royalty Interest Owners") all of whom are, or have members who are, nonresident oil and gas royalty interest owners, hereby petition this Court for a Writ of *Certiorari* to review the judgment of the Oklahoma Supreme Court.

OPINIONS BELOW

The Order by the Oklahoma Supreme Court Denying *Certiorari* And Approving Appellate Opinion For Official Publication, 2007 OK 62 (Okla. July 2, 2007), is reproduced at App. 1-2. The opinion of the Oklahoma Court of Civil Appeals is published at 2007 OK CIV APP 68, 162 P.3d 960 (Okla. Civ. App. March 28, 2007) (No. 104,002), and is reproduced at App. 3-27. The Order of the District Court of Oklahoma Granting Defendants' Motion For Summary Judgment and Denying Plaintiffs' Motion For Summary Judgment, No. CJ-2005-9120 (Okla. Cty. Dist. Ct. Oct. 19, 2006), is reproduced at App. 28-30.

JURISDICTION

The Order of the Oklahoma Supreme Court Denying *Certiorari* and Approving Appellate Opinion

for Official Publication was entered on July 2, 2007. App. 1-2. Pursuant to Supreme Court Rule 13, this Petition is filed timely within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Privileges and Immunities Clause of Article IV of the U.S. Constitution, which provides that "The Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

This Petition also involves 68 Okla. Stat. Ann. § 2385.26, which provides:

> A. Each remitter, except as otherwise provided in subsection B of this section, shall deduct and withhold from each payment being made to any royalty interest owner in respect to production of oil and gas in this state, but not including that to which the remitter is entitled, an amount equal to five percent (5%) of the gross amount which would have otherwise been payable to the person entitled to the payment.
>
> B. The obligation to deduct and withhold from payments as provided in subsection A of this section does not apply to those payments which are made to:

1. *Current or permanent residents of Oklahoma*;
2. The United States, this state or any state or federal agency or political subdivision;
3. Any charitable institution; or
4. Any federally reco nized Indian tribe.

The obligation to deduct and withhold from payments as provided in subsection A of this section does not apply if the remitter and the royal interest owner are the same person.

C. Any royalty interest owner from whom an amount is withheld pursuant to the provisions of subsection A of this section, or if the royalty interest owner is not liable to the State of Oklahoma for income taxes, any person to whom a royalty interest owner subsequently distributes royalty payments with respect to which an amount is withheld pursuant to the provisions of subsection A of this section, and who files an income tax return with this state is entitled to a credit against the tax as shown on the return for the amount withheld by the remitter under subsection A of this section. If the amount withheld is greater than the tax due on the return, the person filing the return shall be entitled to a refund in the amount of the overpayment.

(Emphasis added.)

Other statutory provisions include 68 Okla. Stat. Ann. § 2368(A), which provides, in relevant part:

> A. The following individuals shall each make a return stating specifically the taxable income and the adjustments provided in Section 2351 et seq. of this title to arrive at Oklahoma taxable income and, where necessary, Oklahoma adjusted gross income:
>
> 1. Every resident individual having a gross income, or gross receipts, for the taxable year in an amount sufficient to require the filing of a federal income tax return, if single, or if married and not living with husband or wife; and
>
> 2. Every resident individual having a gross income, or gross receipts, for the taxable year in an amount sufficient to require the filing of a federal income tax return, if married and living with husband or wife. Provided however, every resident individual who does not meet the requirements sufficient to file a federal return, but has Oklahoma withholding, may file a claim for refund for all Oklahoma income taxes withheld and shall not be subject to the provisions of Section 2358 of this title; and
>
> 3. Every nonresident individual having Oklahoma gross income for

> the taxable year of One Thousand Dollars ($1,000.00) or more.
>
> * * * * *

In addition, 68 Okla. Stat. Ann. § 2385.7 provides:

A. Except as provided in subsection B of this section, every taxpayer, as defined by Section 2353 of this title, shall make estimated tax payments for the taxable year if:

> 1. In the case of a single individual taxpayer, the tax liability of the taxpayer can reasonably be expected to be Five Hundred Dollars ($500.00) or more in excess of taxes to be withheld from wages.
>
> 2. In the case of married individuals, the combined tax liability of the married individuals can reasonably be expected to be Five Hundred Dollars ($500.00) or more in excess of taxes to be withheld from wages; or
>
> 3. In the case of a corporation or trust, the tax of the corporation or trust for the taxable year can reasonably be expected to be Five Hundred Dollars ($500.00) or more.

B. Subsection A of this section shall not apply to:

> 1. Estates; and

> 2. Any individual whose gross income from farming for the taxable year is at least sixty-six and two-thirds percent (66 2/3%) of the total estimated gross income from all sources for the taxable year. However if an individual whose gross income from farming qualifies pursuant to the provisions of this paragraph for the previous taxable year, the individual shall not be required to qualify for the current taxable year. In no event shall the qualification for the previous taxable year be carried forward for more than one (1) year.

Lastly, 68 Okla. Stat. Ann. § 2369 provides, in relevant part:

D(1) The Tax Commission, or its duly authorized agent, is authorized and empowered to issue orders to withhold all production payments to any person upon a determination that the person has failed to file a state income tax return as required by law reporting production payment income or has failed to pay state income tax. The order to withhold production payments shall be directed to the person or corporation making production payments and shall apply to all production payments that the person named within such order is entitled to until the return is filed and the income tax, penalty and interest are paid. Release of the order to withhold shall be mailed by the Tax Commission to

> the person or corporation withholding production payments upon the filing of the return and payment of the tax, penalty and interest by the person named within such order or upon payment of the tax, penalty and interest by the person or corporation withholding the production payment.
>
> * * * * *

STATEMENT OF THE CASE

Oil and gas producers within the State of Oklahoma are compelled to withhold five percent of all royalties paid to each royalty interest owner, 68 Okla. Stat. Ann. § 2385.26, which is remitted to the State of Oklahoma and credited against the income tax owed by the royalty interest owner; however, royalty payments to "current or permanent residents of Oklahoma" are specifically excluded from this withholding requirement. *Id.* Thus, a nonresident of Oklahoma receives five percent less in royalties than his identical counterpart who resides in Oklahoma.

In addition, 68 Okla. Stat. Ann. § 2368(A)(3) requires all nonresidents "having Oklahoma gross income for the taxable year of One Thousand Dollars ($1,000.00) or more" to file an income tax return. Oklahoma residents, however, need not file such a return unless they are required to file a federal income tax return on their Oklahoma adjusted gross income. 68 Okla. Stat. Ann. § 2368(A)(1). In 2005, people with taxable income of $8,200 or more (for

single individuals) or $16,400 or more (for married couples filing jointly) were required to file such a return.[1] App. 16-17. Moreover, individuals who do not reasonably expect to have tax liabilities are not required to make estimated tax payments. 68 Okla. Stat. Ann. § 2385.7

Taken together, sections 2385.26, 2368, and 2385.7 have the following disparate, and for nonresidents, onerous effect:

* Single, individual nonresidents of Oklahoma with royalty interests earning less than $1,000 in Oklahoma income do not have to pay income tax to the State of Oklahoma; nonetheless, they are subject to the 5 percent withholding requirement on their royalty interests.

* Single, individual royalty interest owners who are Oklahoma residents and who earn less than $8,200 in Oklahoma income simply pocket the entirety of their royalty payments without ever having any monies withheld, without having to file an income tax return to recoup the withheld royalty payments, and without having to make estimated tax payments.

PPROA has numerous members who own royalty interests on properties located within the State of

[1] The complaint was filed in 2005, thereby making 2005 tax rates relevant.

Oklahoma but who reside outside the State of Oklahoma; therefore, they are subject to the withholding tax. App. 5. Likewise, Producers, which owns royalty interests in Oklahoma and has its principal place of business in Amarillo, Texas, is subject to the withholding tax. App. 10-11.

On November 21, 2005, PPROA filed a petition in Oklahoma County District Court, which, once amended, challenged the constitutionality of Oklahoma's tax scheme as contrary to, *inter alia*, the Privileges and Immunities Clause of Article IV of the U.S. Constitution. On June 27, 2006, after Cambridge Producers, Ltd. and Thomas R. Cambridge were added as co-Plaintiffs, the Nonresident Royalty Interest Owners filed a Second Amended Petition alleging, *inter alia*, that "Members of the PPROA who reside outside of the State of Oklahoma but who own royalty interest in Oklahoma, Producers, and Mr. Cambridge have constitutionally protected privileges and immunities currently infringed upon by Oklahoma's disparate tax withholding statute." App. 34.

On August 31, 2006, the Oklahoma Tax Commission ("OTC") filed a Motion for Summary Judgment on the merits, and on September 18, 2006, the Nonresident Royalty Interest Owners likewise filed their Motion for Summary Judgment (and Response to the OTC's Motion). In a two-paragraph order, the trial court granted the OTC's Motion for Summary Judgment and denied that of the Nonresident Royalty

Interest Owners. App. 28-30. Final judgment was entered by the trial court on October 19, 2006. *Id.*

On November 11, 2006, the Nonresident Royalty Interest Owners timely filed a Petition in Error with the Oklahoma Court of Civil Appeals. On March 28, 2007, the Oklahoma Court of Civil Appeals affirmed the trial court's decision. App. 3-27. In holding that the Oklahoma tax scheme did not discriminate against nonresidents, the Oklahoma Court of Civil Appeals cited *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), for the proposition that withholding monies from nonresidents does not constitute discrimination under the Privileges and Immunities Clause so long as nonresidents are not taxed at a different rate than are residents. App. 17-20.

Then, in *dicta*, the Oklahoma Court of Civil Appeals concluded that, even if there had been actionable, unconstitutional discrimination against nonresidents, there was a substantial reason for this difference in treatment: avoidance by the state of the expense, burden, and delay of litigation to collect unpaid taxes. App. 14-15, App. 21-22.

On April 17, 2007, the Nonresident Royalty Interest Owners filed a Petition for *Certiorari* with the Oklahoma Supreme Court. On July 2, 2007, *certiorari* was denied without explanation from the Oklahoma Supreme Court; however, the court did approve the decision of the Oklahoma Court of Civil

Appeals for official publication and thus accorded it precedential value. App. 1-2.

REASONS FOR GRANTING THE PETITION

I. THE HOLDING OF THE OKLAHOMA COURT OF CIVIL APPEALS CONFLICTS WITH DECISIONS OF THIS COURT THAT HOLD THAT THE PRIVILEGES AND IMMUNITIES CLAUSE PROHIBITS STATES FROM EFFECTING A MORE ONEROUS TAX BURDEN ON NONRESIDENTS THAN ON ITS RESIDENTS.

The Privileges and Immunities Clause of Article IV of the U.S. Constitution provides that "The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. "The object of the Privileges and Immunities Clause is to 'strongly . . . constitute the citizens of the United States one people,' by 'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States is concerned.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)). "One right thereby secured is the right of a citizen of any State to 'remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter States are

subject to.'" *Lunding*, 522 U.S. at 296 (quoting *Shaffer v. Carter*, 252 U.S. 37, 56 (1920)). In other words, there must be "substantial equality of treatment" between residents and nonresidents. *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975).

In *Shaffer*, and then again in *Lunding*, this Court held that "where the question is whether a state taxing law contravenes rights secured by [the Privileges and Immunities Clause], the decision must depend not upon any mere question of form, construction, or definition, but upon *the practical operation and effect of the tax imposed.*" *Lunding*, 522 U.S. at 297 (quoting *Shaffer*, 252 U.S. at 53) (emphasis added). In other words, the Privileges and Immunities Clause commands that a nonresident may only be compelled "to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the . . . State." *Lunding*, 522 U.S. at 297 (quoting *Shaffer*, 252 U.S. at 53).

A. By Depriving Only Nonresidents Of The Time Value Of Money, The Oklahoma Tax Scheme Effects A More Onerous Tax Burden On Nonresidents Than On Oklahoma Residents.

The Oklahoma tax scheme, 68 Okla. Stat. Ann. § 2385.25 *et seq.*, which requires the withholding of five percent of nonresidents' royalty payments, imposes a more onerous tax burden on nonresidents than on residents. This burden results because

Oklahoma denies nonresidents, but not residents, immediate use of their Oklahoma-derived income.

It is axiomatic that "[s]atisfaction of want in the nearer future is, other things being equal, preferred to that in the farther distant future. Present goods are more valuable than future goods." Ludwig von Mises, *Human Action: A Treatise on Economics* at 483 (3d rev. ed. 1966). Absent time preference for money, the phenomenon of interest would not exist.

Although this Court has held that the "interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests[,]" *Andrus v. Allard*, 444 U.S. 51, 66 (1979), this statement implicitly recognizes that the opportunity to earn interest has value. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (holding that the interest generated by funds is the private property of the owner of the principal).

The deprivation of this value from only nonresidents, pursuant to 68 Okla. Stat. Ann. § 2385.26, treats Nonresident Royalty Interest Owners differently than resident royalty interest owners. This disparate treatment inflicted upon Nonresident Royalty Interest Owners is not merely one of "form, construction, or definition"; instead, the "practical operation and effect" of the tax imposed by the Oklahoma scheme results in a "more onerous" burden on the Nonresident Royalty Interest Owners. After all, the interest earned on the money throughout the

course of a tax year may be significant, as is the deprivation of the opportunity to earn this money.

The Oklahoma Court of Civil Appeals' reliance on *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79 (1920), for the proposition that Oklahoma's withholding scheme does not violate the Privileges and Immunities Clause is misplaced. In *Travis*, the plaintiff was an employer that was compelled to withhold taxes from the income it paid to nonresident employees. *Travis*, 252 U.S. at 74. In contrast, Petitioners in this case are royalty interest owners (and an entity that represents royalty interest owners). This distinction is significant. There is no evidence that the plaintiff in *Travis* argued that the withholding statute in question would deprive its employees of the time value of money; indeed, the corporation likely lacked standing to raise such an argument on behalf of its employees. *Travis*, 252 U.S. 60; *Yale & Towne Mfg. Co. v. Travis*, 262 F. 576 (S.D.N.Y. 1919). The district court explained simply that "[t]he withholding of any sum from the salaries of nonresidents is objected to, inasmuch as there is no withholding from residents." *Id.* at 580. There is no discussion of the potential to earn interest. Thus, although this Court in *Travis* concluded that a statute did not violate the Privileges and Immunities Clause when it required withholding income only from nonresidents, *Travis* provides no support for the Oklahoma Court of Civil Appeals in its analysis of the Nonresident Royalty Interest Owners' claims regarding the time value of money.

Additionally, in reaching its determination, the *Travis* Court relied in part on the fact that the State of New York imposes no "personal liability" on the nonresidents and, therefore, must "adopt a convenient substitute for it." *Travis*, 252 U.S. at 76. In contrast, *In re Income Tax Protest of Alani* establishes that Oklahoma "has personal jurisdiction to assess and collect a tax" on a person's oil and gas royalty interest income "that is attributable to property within Oklahoma." 2006 OK CIV APP 54, 135 P.3d 828, 833 (Okla. Civ. App. 2005).

Further undercutting the Oklahoma Court of Civil Appeals' reliance on it, *Travis* held that a statute, which deprives nonresidents of certain tax exemptions, violates the Privileges and Immunities Clause. *Travis*, 252 U.S. at 77-82; *accord Lunding*, 522 U.S. at 302. Here, 68 Okla. Stat. Ann. § 2385.26 generally requires the withholding of five percent of all payments to all royalty interest owners, and then expressly exempts "[c]urrent or permanent residents of Oklahoma[.]" By failing to rule that § 2385.26 violates the Privileges and Immunities Clause, the Oklahoma Court of Civil Appeals acted in conflict with this Court's holding in *Travis*.

Because the rulings below conflict with the holdings of this Court in *Lunding*, *Shaffer*, *Allard*, and *Travis*, this Court should grant *certiorari*.

B. By Setting Different Thresholds At Which Income Tax Returns Must Be Filed, The Oklahoma Tax Scheme Effects A More Onerous Tax Burden On Nonresidents.

The Oklahoma tax scheme also imposes tax burdens that are "more onerous in effect" on nonresidents than on residents because it sets different threshold limits for filing income tax returns. Pursuant to 68 Okla. Stat. Ann. § 2368(A)(3), "[e]very nonresident individual having Oklahoma gross income for the taxable year of One Thousand Dollars ($1,000.00) or more" must file a tax return; however, Oklahoma residents need only file an Oklahoma tax return if they are required to file a federal income tax return on their Oklahoma adjusted gross income. 68 Okla. Stat. Ann. § 2368(A)(1). For the relevant year, only those having taxable income of $8,200 or more (for single individuals) or $16,400 or more (for married couples filing jointly) were required to file such a return.[2] App. 16-17.

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[2] On its face, the Oklahoma tax scheme effects a more onerous burden on nonresidents than on Oklahoma residents because nonresidents are required to pay Oklahoma income taxes on Oklahoma income of $1,000 or more, whereas single, individual Oklahoma residents need only pay Oklahoma income taxes on income of $8,200 or more. In *Travis*, this Court held that a New York statute that exempted from taxation the first $1,000 from New York residents but did not grant nonresidents this exemption violated the Privileges and Immunities Clause. *Travis*, 252 U.S. at 79-82. Accordingly, the Oklahoma tax scheme also violates the Privileges and Immunities Clause.

Furthermore, pursuant to 68 Okla. Stat. Ann. §§ 2385.7 – 2385.9, single individuals, married individuals, and corporations must make quarterly estimated tax payments only if their expected Oklahoma income tax liability for the year exceeds $500. However, single, individual Oklahoma residents whose Oklahoma income does not exceed $8,200 for the year, and nonresidents whose Oklahoma income does not exceed $1,000 for the year do not have any income tax to pay and, thus, do not have to make quarterly estimated tax payments.

Therefore, nonresidents who earn less than $1,000 in royalties (and other Oklahoma income) per year are subject to the five percent withholding provision even though they are not required to file an Oklahoma income tax return. In order to receive the withheld moneys, nonresidents must file for an income tax refund. 68 Okla. Stat. Ann. § 2385.26(C). On the other hand, similarly situated Oklahoma residents, who are not subject to the withholding requirement, need neither make estimated tax payments, 68 Okla. Stat. Ann. § 2385.7, nor file an income tax return, 68 Okla. Stat. Ann. § 2368(A), if their Oklahoma gross income is less than $8,200 ($16,400 if married and filing jointly).

The Oklahoma withholding scheme effects an onerous burden on nonresidents by requiring that they file an income tax return to recoup their withheld monies. That the burden of filing tax returns is timely and costly is beyond dispute; for example, it has spawned an entire industry. *See, e.g.*, H&R Block,

http://www.hrblock.com (last visited Sept. 5, 2007). Indeed, in a 2005 report, the U.S. Government Accountability Office estimated that the cost of complying with income tax laws is approximately which one percent of the GDP (approximately $107 billion annually) and the residual cost to efficiency is approximately another two percent to five percent of the GDP (approximately $214 billion to $535 billion annually). U.S. Gov't Accountability Office, Report to Congressional Requesters GAO-05-878, *Tax Policy: Summary of Estimates of the Costs of the Federal Tax System*, *available at* http://www.gao.gov/new.items/d05878.pdf (last visited Sept. 18, 2007).

Ultimately, the cost of filing an income tax return may, in fact, exceed the amount the nonresident hopes to recoup. Thus, the nonresident may have to choose whether to pay the costs to file the return or relinquish his claim to the withheld monies. Little wonder that the Oklahoma Legislature was so eager to enact and the Oklahoma court so quick to uphold the withholding scheme: that scheme makes it more likely that monies that the State is not owed will remain in Oklahoma's coffers.

Further, those nonresidents who do file an income tax return to recoup their withheld monies are deprived of the time value of money during the period of time the monies are withheld. *See* Section I(A), *supra*. Similarly situated Oklahoma residents, however, can enjoy or invest their royalties payments during the period of time the nonresidents' monies are in the hands of Oklahoma officials.

Contrary to the holdings of this Court, specifically *Lunding*, *Shaffer*, and *Austin*, the Oklahoma tax scheme effects a more onerous burden on nonresidents than on residents; therefore, this Court should grant this petition to review the ruling that the Oklahoma tax scheme does not violate the Privileges and Immunities Clause of Article IV.

II. THE DECISION OF THE OKLAHOMA COURT OF CIVIL APPEALS CONFLICTS WITH DECISIONS OF THIS COURT THAT HOLD THAT TO SATISFY THE PRIVILEGES AND IMMUNITIES CLAUSE, A STATE MUST PROVE A "SUBSTANTIAL REASON FOR THE DIFFERENCE IN TREATMENT" BETWEEN NONRESIDENTS AND ITS RESIDENTS.

In *Travis*, this Court held that "if there be no reasonable ground for the diversity of treatment [between residents and nonresidents of a state], [a statute] abridges the privileges and immunities to which [. . .] citizens are entitled." 252 U.S. at 79. Recently, this Court has developed a standard to determine whether discrimination against nonresidents is "reasonable," and therefore permissible, under the Privileges and Immunities Clause. Specifically a state must prove: "(i) there [must be] a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents [must] bear[ ] a substantial relationship to the State's objective." *Supreme Court of New Hampshire v. Piper*,

470 U.S. 274, 284 (1985); *accord Lunding*, 522 U.S. at 298; *see also Austin*, 420 U.S. at 665 (describing the rule of "substantial equality of treatment").

This test is much more stringent than the "rational basis test," under which a law is upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Instead, under the "substantial relationship" test, a court must "consider[] the availability of less restrictive means." *Piper*, 470 U.S. at 274.

A. The Oklahoma Tax Scheme, Which Discriminates Against Nonresidents In Favor Of Residents, Has No Justification, Much Less A "Substantial Reason," For The "Difference In Treatment."

The Oklahoma Court of Civil Appeals determined that withholding income taxes from nonresidents of Oklahoma allows the state to "avoid[] the expense, burden, and delay of litigation" purportedly necessary to collect income taxes from nonresidents in the absence of the withholding scheme. App. 14-15. The court then held: "[a]voidance of that burden and expense is a substantial reason for the different treatment; directing operators to withhold the taxes before the royalties leave the state necessarily bears a substantial relationship to the state's objective." App. 21-22.

Assuming, *arguendo*, that the avoidance of litigation is a satisfactory reason to withhold income taxes, it is not a "substantial reason for" Oklahoma's "*difference in treatment*," *Piper*, 470 U.S. at 284 (emphasis added), between nonresident and resident owners of oil and gas royalty interests. If Oklahoma were legitimately concerned about the "expense, burden and delay of litigation" in collecting unpaid income taxes, it would want to withhold a percentage of the payments from all royalty interest holders, not just those who do not reside in Oklahoma. Therefore, there is an obvious and simple alternative to the discriminatory approach utilized by the Oklahoma tax scheme, an alternative that employs "less restrictive means": Oklahoma could simply withhold taxes from all royalty interest owners, both residents and nonresidents.

Because the Oklahoma ruling conflicts with the holding of this Court in *Piper*, 470 U.S. at 284, that a State must set forth a "substantial reason for the difference in treatment," this Court should grant this Petition.

B. There Is No Evidence That The Oklahoma Tax Scheme Saves The State The Expense, Burden And Delay Of Litigation.

In *Barnard v. Thorstenn*, this Court made clear that the burden is on the government to put forth a substantial reason for the difference in treatment.

489 U.S. 546, 553-54 (1989) ("We find none of these justifications sufficient to meet the Virgin Island's burden of demonstrating that the discrimination against nonresidents . . . is warranted by a substantial objective . . . "). The OTC has failed to meet this burden. In fact, the OTC has proffered only one reason for the discriminatory treatment: that, absent the withholding statute, it would be difficult to determine the identity of nonresidents owing taxes on royalties. App. 13-14. Citing the OTC's ability to identify a nonresident royalty interest owner in *Alani*, the Oklahoma Court of Civil Appeals correctly rejected this justification. *Id.*

The Oklahoma Court of Civil Appeals then proceeded, however, to invent its own justification for the discriminatory tax scheme. Relying again on *Alani*, the court concluded, without any evidence, that a "substantial reason" for the tax scheme was avoidance of "the expense, burden, and delay of litigation." App. 14-15. Indeed, the court went so far as to conclude, without any support, that *Alani* was the "likely impetus for the enactment of § 2385.26." App. 13. But, *Alani* proves nothing of the sort.

In *Alani*, a nonresident royalty interest owner had sufficient Oklahoma royalty income, prior to the enactment of the withholding scheme, to be required to file an income tax return in Oklahoma. *Alani*, 135 P.3d at 830. Nonetheless, the royalty interest owner did not file the tax return. The OTC subsequently sent the royalty interest owner a letter advising him that he owed taxes and that if he did not pay, the

OTC could order future royalty payments withheld, pursuant to 68 Okla. Stat. Ann. § 2369(D)(1). *Alani*, 135 P.3d at 830. Upon receipt of that letter, the royalty interest owner challenged the jurisdiction of the OTC. Relying in part on *Shaffer*, the court ultimately concluded that Oklahoma satisfied the jurisdictional requirements and, as a result, could "enforce the tax through reservation of future royalty payments attributable to the same property." *Alani*, 135 P.3d at 831-32 (citing *Shaffer*, 252 U.S. at 228).

Had the royalty interest owner in *Alani* not challenged the personal jurisdiction of Oklahoma to assess and collect a tax on his Oklahoma-derived income – a matter easily adjudicated by the OTC and the courts against the royalty interest owner – there would have been no need at all for litigation.[3] Instead, upon determining that taxes were owed, the OTC could have simply ordered the royalty payments withheld. In essence, therefore, the Oklahoma Court of Civil Appeals must have reasoned that the process of withholding a delinquent taxpayer's royalty payments caused undue expense, delay, and burden on the OTC. There is no evidence, however, that the amount of postage on the letter to the nonresident royalty interest owner was expensive or burdensome or that there was an undue delay in the delivery of the letter, nor is there any evidence that it would be

[3] Should a similarly situated nonresident royalty interest owner make such an argument, the courts would likely dismiss the case without much "expense, burden, [or] delay."

expensive, burdensome, or untimely to withhold future royalty payments.[4]

Ultimately, the OTC failed to satisfy its burden of proving a substantial reason for the difference in treatment, and the justification proffered *sua sponte* by the Oklahoma Court of Civil Appeals is meritless. As a result, the decision of the Oklahoma Court of Civil Appeals conflicts with *Barnard*, 489 U.S. at 553-54, and the burdens of proof established therein.

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[4] Even if such a justification could be conclusively proved, avoidance of the "expense, burden, and delay" of litigation is insufficient to satisfy the "substantial relationship" test. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (in an Equal Protection context, administrative convenience is not a sufficient basis for engaging in unconstitutional distinctions).

CONCLUSION

Because the ruling of the Oklahoma Court of Civil Appeals conflicts with relevant decisions of this Court interpreting the Privileges and Immunities Clause, *certiorari* should be granted.

Respectfully submitted:

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Submitted October 1, 2007

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2007 OK 62

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD; and THOMAS R. CAMBRIDGE,	)	
Plaintiffs/Appellants	)	
v.	)	**No. 104,002**
OKLAHOMA TAX COMMISSION; and THOMAS E. KEMP, JR., JERRY B. JOHNSTON, and CONSTANCE IRBY, TAX COMMISSIONERS, all in their official capacities,,	)	
Defendants/Appellees	)	

¶ 0 ORDER DENYING CERTIORARI AND APPROVING APPELLATE OPINION FOR OFFICIAL PUBLICATION

(Filed Jul. 2, 2007)

¶ 1 The Appellants' Petition for Certiorari to review the opinion of the Court of Civil Appeals, Division I, is hereby DENIED.

¶ 2 VOTE ON DENIAL OF CERTIORARI: ALL JUSTICES CONCUR.

¶ 3 The opinion of the Court of Civil Appeals, Division I, filed herein with the Clerk of that court on March 28, 2007, is hereby Approved for Official Publication by the Oklahoma Supreme Court and

shall be accorded precedential value. 12 O.S.2001 Ch. 15, App. 1, Okla.Sup.Ct.R. 1.200(c)(2). The published opinion of the Court of Civil Appeals herein shall bear the notation "Approved for Publication by the Supreme Court." *Id.*

¶ 4 VOTE ON SUPREME COURT APPROVAL OF OPINION FOR OFFICIAL PUBLICATION: WINCHESTER, C.J., EDMONDSON, V.C.J., LAVENDER, J., HARGRAVE, J., TAYLOR, J,. and COLBERT, J.: CONCUR.

¶ 5 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 2ND DAY OF JULY, 2007.

/s/ [Illegible] R. Winchester
CHIEF JUSTICE

THIS OPINION HAS BEEN RELEASED
FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION I

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD.; and THOMAS R. CAMBRIDGE,	)	
Plaintiffs/Appellants,	)	
v.	)	No. 104,002
OKLAHOMA TAX COMMISSION; and THOMAS E. KEMP, JR., JERRY B. JOHNSTON, AND CONSTANCE IRBY, TAX COMMISSIONERS, all in their official capacities,	)	
Defendants/Appellees.	)	

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

(Filed Mar. 28, 2007)

HONORABLE DANIEL L. OWENS, JUDGE

AFFIRMED

John Steven Gardner,
Harlan Hentges,
MULINIX, OGDEN, HALL,
ANDREWS & LUDLAM, PLLC,
Oklahoma City, Oklahoma,
and
Joseph F. Becker,
MOUNTAIN STATES
LEGAL FOUNDATION,
Lakewood, Colorado, For Plaintiffs/Appellants.

Douglas B. Allen,
Guy L. Hurst,
Sean R. McFarland,
OKLAHOMA TAX COMMISSION,
Oklahoma City, Oklahoma, For Defendants/Appellees.

Opinion by Kenneth L. Buettner, Judge:

¶ 1 At issue in this case is the constitutionality of an Oklahoma statute requiring operators to withhold income tax from oil and gas royalty payments made to royalty interest owners who do not reside in Oklahoma. Plaintiffs/Appellants Panhandle Producers and Royalty Owners Association (PPROA), Cambridge Producers, Ltd., and Thomas R. Cambridge, assert that the statute imposes disparate taxation based on state of residence, in violation of the Privileges and Immunities Clause, the Equal Protection Clause, and the Interstate Commerce Clause of the United States Constitution. Defendant/Appellee Oklahoma Tax Commission (OTC) asserts the statute is constitutional because it does not impose different tax rates based on residency, but instead is only a different method of collecting the taxes due. The material facts

are undisputed. The withholding statute is a method of collecting taxes which does not increase the actual tax burden on non-residents. Additionally, OTC has shown a rational basis for the classification in the statute. The collection method has only an incidental effect of interstate commerce, which is outweighed by OTC's interest in collecting taxes before the income leaves the state. The statute passes constitutional muster and OTC is entitled to judgment as a matter of law. We affirm.

¶ 2 PPROA is a trade association representing royalty owners in Texas, Oklahoma, and Kansas. In its Petition, PPROA asserted it had numerous members subject to the withholding requirement of the statute at issue, 68 O.S.Supp.2006 § 2385.26, which is part of a group of related statutes numbered § 2385.25-§ 2385.28, all of which were passed in 2000.[1] Briefly summarized, § 2385.26 directs payors

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[1] Those sections provide, in pertinent part:

§ 2385.25. Definitions

As used in this section through Section 2385.28 of this title:

* * *

2. "Remitter" means any person who distributes revenue to royalty interest owners; and

3. "Royalty interest owner" means any person who retains a non-working interest in oil or gas production.

§ 2385.26. Royalty interest owner – Withholding and deducting – Exceptions

A. Each remitter, except as otherwise provided in subsection B of this section, shall deduct and withhold

(Continued on following page)

from each payment being made to any royalty interest owner in respect to production of oil and gas in this state, but not including that to which the remitter is entitled, an amount equal to five percent (5%) of the gross amount which would have otherwise been payable to the person entitled to the payment.

B. *The obligation to deduct and withhold* from payments as provided in subsection A of this section *does not apply to those payments which are made to:*

1. Current or permanent residents of Oklahoma;

* * *

C. Any royalty interest owner from whom an amount is withheld pursuant to the provisions of subsection A of this section, or if the royalty interest owner is not liable to the State of Oklahoma for income taxes, any person to whom a royalty interest owner subsequently distributes royalty payments with respect to which an amount is withheld pursuant to the provisions of subsection A of this section, and *who files an income tax return with this state is entitled to a credit against the tax as shown on the return for the amount withheld by the remitter* under subsection A of this section. If the amount withheld is greater than the tax due on the return, the person filing the return shall be entitled to a refund in the amount of the overpayment.

[As originally passed, § 2385.26(A) required remitters to withhold 6.75% from royalty payments. This section was amended effective July 1, 2006. At oral argument held in this case, PPROA asserted the statute was amended only in response to its lawsuit. PPROA claimed 6.75% was greater than the maximum tax rate in Oklahoma. The 5% withholding amount in the current version of the statute is lower than the maximum Oklahoma tax rate.]

§ 2385.27. Payments – Due dates – Returns

A. Any remitter required to deduct and withhold any amount under Section 7 of this act shall pay to the Oklahoma Tax Commission the amounts required to be deducted and withheld as follows:

(Continued on following page)

of oil and gas royalties to withhold 5% of such royalties and remit the withholding to OTC. The statute exempts from the withholding requirement those royalty payments made to Oklahoma residents. The statute grants nonresidents credit towards taxes owed for amounts withheld, as well as refunds of amounts withheld which exceed the taxes owed.

¶ 3 PPROA asserted causes of action for violations of the Privileges and Immunities,[2] Equal Protection,[3]

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1. For payments made to royalty interest owners during the months of January, February and March, the withholding amounts shall be due on or before April 30;

2. For payments made to royalty interest owners during the months of April, May and June, the withholding amounts shall be due on or before July 30;

3. For payments made to royalty interest owners during the months of July, August and September, the withholding amounts shall be due on or before October 30; and

4. For payments made to royalty interest owners during the months of October, November and December, the withholding amounts shall be due on or before January 30 of the succeeding calendar year.

* * *

(Emphasis added).

[2] United States Const. Art. IV § 2, cl. 1, provides:

"Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[3] United States Const., Am. XIV, provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

(Continued on following page)

and Interstate Commerce Clauses[4] of the U.S. Constitution. PPROA asserted the trial court had jurisdiction of the matter pursuant to 68 O.S.2001 § 226.[5]

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are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] United States Const. Art. I § 8, cl. 4 provides:

"The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[5] § 226. Action to recover taxes as additional remedy to aggrieved taxpayer

(a) In addition to the right to a protest of a proposed assessment as authorized by Section 221 of this title, *a right of action is hereby created to afford a remedy to a taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax*; however, such remedy shall be limited as prescribed by subsection (c) of this section.

(b) Within thirty (30) days from the date of mailing to the taxpayer of an assessment for taxes or additional taxes pursuant to Section 221 of this title by the Tax Commission, any such taxpayer shall pay the tax to the Tax Commission, and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. The taxpayer shall not be required to file suit within such thirty-day period in order to prosecute an action as authorized by this section; however, failure to file such suit within one (1) year from the date of mailing

(Continued on following page)

PPROA asked for a declaratory judgment that the statute was unconstitutional, and for an injunction to stop enforcement.

¶ 4 OTC sought to dismiss based on its assertion PPROA did not meet the specific jurisdictional requirements of § 226 because no PPROA member

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of the assessment shall result in the assessment becoming final and absolute. . . . *If the taxpayer prevails* and the court determines that the position of the Tax Commission in the proceeding was not substantially justified, *the court shall award the taxpayer a judgment for reasonable attorney fees,* reasonable expenses of expert witnesses in connection with the proceeding and reasonable costs of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the taxpayer's case.

(c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. *It shall be construed to provide a legal remedy in the state or federal courts by action at law only in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act or provision of the Federal Constitution,* or in cases where jurisdiction is vested in any of the Courts of the United States. In all actions brought hereunder service of process upon the Chairman of the Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

* * *

(Emphasis added).

claimed to have received a "proposed assessment" of tax due to trigger § 226(b). PPROA countered that it had claimed its members were subject to the challenged withholding requirement and that it was not protesting an assessment but seeking declaratory relief. PPROA asserted § 226 specifically provides jurisdiction for claims by a taxpayer aggrieved by any state tax law, and that it provides jurisdiction for claims that a tax is unconstitutional. PPROA also noted that in *OTC v. Smith,* 1980 OK 74, 610 P.2d 794, the Oklahoma Supreme Court held that the § 226 remedy is not exclusive, and that a district court has jurisdiction, under 12 O.S. § 1651 to enter a declaratory judgment on the constitutionality of a tax statute even where § 226 is inapplicable. PPROA also claimed jurisdiction was proper under 42 U.S.C. § 1983.[6]

¶ 5 The District Court granted OTC's Motion to Dismiss.[7] In its Second Amended Petition, PPROA

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[6] Suits for violation of the Commerce Clause may be brought under § 1983 to obtain injunctive and declaratory relief from state action that violates the Commerce Clause. *Dennis v. Higgins,* 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). However, the Supreme Court has since held that state courts may not grant relief under § 1983 where there is an adequate state remedy available. *National Private Truck Council, Inc. v. Oklahoma Tax Com'n,* 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

[7] PPROA then filed a First Amended Petition in which it restated its claims, but asserted jurisdiction under 68 O.S.2001 § 226, 12 O.S.2001 § 1651, and 42 U.S.C. § 1983. In its Answer,

(Continued on following page)

added Cambridge, a non-resident royalty interest owner subject to the withholding requirement of § 2385.26, as a plaintiff.[8] OTC again sought dismissal based on its argument the District Court had no jurisdiction under 68 O.S. § 226[9] and 42 U.S.C. § 1983.[10] OTC asserted jurisdiction was proper only under 12 O.S.2001 § 1651. The trial court dismissed PPROA's claims under § 226 and § 1983.[11]

¶ 6 The parties then filed competing motions for summary judgment on PPROA's and Cambridge's remaining claim for declaratory judgment. The trial court granted summary judgment to OTC October 19, 2006. PPROA and Cambridge appeal.

OTC asserted the affirmative defenses of lack of standing, lack of capacity to sue, and failure to state a claim.

[8] The Second Amended Petition repeated the claims made in the First Amended Petition, and added a claim for attorney fees under 42 U.S.C. § 1988.

[9] OTC asserted the dismissal of the original Petition based on lack of jurisdiction under § 226 was law of the case.

[10] OTC noted the United States Supreme Court had held that courts may not employ § 1983 in controversies over state tax laws where declaratory relief (or other state remedy) is available, citing *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

[11] Because we find no constitutional violation in the statute at issue, we do not address PPROA's claim on appeal that jurisdiction was proper under 68 O.S.2001 § 226 and 42 U.S.C. § 1983 in addition to 12 O.S.2001 § 1651. The only difference in the remedy available under § 226 and § 1983 as opposed to § 1651 is the availability of an award of attorney fees to PPROA if it had prevailed.

¶ 7 Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S.2001, Ch. 2, App.1. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. *Brown v. Alliance Real Estate Group,* 1999 OK 7, 976 P.2d 1043, 1045. Summary judgment is not proper where reasonable minds could draw different inferences or conclusions from the undisputed facts. *Id.* Further, we must review the evidence in the light most favorable to the party opposing summary judgment. *Vance v. Fed. Natl. Mortg. Assn.,* 1999 OK 73, 988 P.2d 1275. Here, the parties do not dispute the material facts.[12] They dispute the legal question of whether the statute in question is constitutional. We review questions of law *de novo.*

¶ 8 A legislative act is presumed to be constitutional and will be upheld unless it is "clearly, palpably and plainly inconsistent with the Constitution." *Reherman v. Oklahoma Water Resources Bd.,* 1984 OK 12, 679 P.2d 1296, 1300. Whenever possible, statutes should be construed so as to uphold their constitutionality. *Id.* We do not look to the Constitution to determine whether the legislature is authorized to do

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[12] Although the parties have each consented to the other's statement of undisputed facts for purposes of summary judgment, both parties have reserved the right to conduct discovery to determine factual disputes in the event this case is remanded for trial.

an act, but rather to see whether the act is prohibited. *Draper v. State,* 1980 OK 117, ¶ 10, 621 P.2d 1142, 1146. The party challenging the constitutionality of a statute has the burden of proof and every presumption is to be indulged in favor of constitutionality. *Fent v. Oklahoma Capitol Improvement Auth.,* 1999 OK 64, 984 P.2d 200. The Legislature has plenary power to tax, subject only to constitutional restrictions and the will of the people expressed through elections. *In re Oneok Field Services Gathering, LLC,* 2001 OK 116, ¶ 8, 38 P.3d 900, 903. The United States Supreme Court has noted that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Austin v. New Hampshire,* 420 U.S. 656, 661, 95 S.Ct. 1191, 1195, 43 L.Ed.2d 530 (1975), quoting *Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

¶ 9 A recent decision by another division of this court reveals the likely impetus for the enactment of § 2385.26. *In re Income Tax Protest of Alani,* 2006 OK CIV APP 54, 135 P.3d 828, involved a nonresident's protest of the assessment of income taxes on royalties paid for oil and gas produced in Oklahoma. In that case, OTC sent the nonresident a letter, in 1995, informing him he was required to file an Oklahoma tax return and pay income taxes on royalties he had received.[13] In its letter, OTC noted it had authority,

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[13] This fact pattern contradicts OTC's assertion, made at oral argument, that it has no knowledge of out of state royalty

(Continued on following page)

pursuant to 69 O.S.1991 § 2369(D) "to order *all production payments withheld*" in the case of a person who has not filed a return or paid state income taxes. (Emphasis added). The nonresident filed a protest in which he admitted he received royalty income from Oklahoma production, but denied OTC had any right to assess or collect income tax from him as a nonresident. In an administrative hearing, OTC ruled against the nonresident and he sought review in this court.

¶ 10 The appellate court noted it had been settled since 1920 that a nonresident who earns income in Oklahoma must pay Oklahoma income tax. *Id.* at ¶ 9, citing *Shaffer v. Carter,* 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920). Additionally, the Oklahoma Tax Code imposes a tax on income of nonresidents attributable to ownership of real or tangible personal property in Oklahoma. 68 O.S.2001 § 2362(1)(a). *Id.* at ¶ 8. The court concluded that OTC had jurisdiction to assess and collect a tax on royalty income attributable to property within Oklahoma, regardless of the place of residence of the royalty owner. *Id.* at ¶ 21.

¶ 11 The *Alani* decision illustrates that prior to the passage of § 2385.26, if a nonresident failed to pay income taxes on royalty payments, OTC had the option to order withholding the entire royalty payment to

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owners and that, absent the withholding statute, it would have to audit operators to determine the identity of nonresidents owing taxes on royalties.

compel payment of taxes. That statute, § 2369(D), applies regardless of residency and remains effective. The withholding provision in § 2385.26 avoids that extreme remedy, however, by ordering the taxes withheld before payment of royalties to nonresidents. PPROA takes from *Alani* that withholding is unnecessary because *Alani* established that OTC had jurisdiction to pursue nonresidents for unpaid taxes. We find *Alani* instead shows the efficiency of collecting the taxes from nonresidents through withholding, which avoids the expense, burden, and delay of litigation.

¶ 12 PPROA asserts the statute discriminates in two ways: first, by depriving nonresidents of the time value of money between the time the taxes are withheld and the receipt of any refund, and second, by requiring nonresidents to file tax returns to claim refunds of overpaid withholding, while Oklahoma residents with low incomes are not required to file returns. PPROA contends the withholding statute violates the Privileges and Immunities Clause and the Equal Protection Clause because the statute denies non-resident royalty owners the same freedom to enjoy their property as Oklahoma residents enjoy. PPROA's argument is that by withholding income taxes from royalties paid to non-residents while allowing Oklahoma residents to pay those taxes at the time of filing their returns allows the Oklahoma resident royalty owners to enjoy the use of the tax money (primarily to earn interest on it) while non-residents are deprived

from using those tax dollars to their advantage before the tax return due date.

¶ 13 PPROA further claims that the withholding statute may allow Oklahoma resident royalty owners with lower incomes avoid paying the taxes on their royalties, while non-residents necessarily pay the taxes on their royalties because the taxes are withheld. PPROA notes the Oklahoma Tax Code requires residents with more than $16,400 gross income (for married couples filing jointly) to file a tax return, while non-residents must file returns if they have only $1,000 in income. PPROA contends that requiring non-residents to file returns at lower income levels adds to the burden placed on non-residents by the withholding statute.[14]

¶ 14 PPROA asserts that virtually all nonresident royalty interest owners face the burden of filing tax returns – either to claim a refund of excess withholding or because they have as little as $1,000 in Oklahoma gross income. PPROA contrasts this burden with the situation of resident royalty owners who have not had taxes withheld and who may have less than $16,400 in gross income and therefore not have to file returns nor seek refunds of withheld royalty taxes. At oral argument in this case, PPROA announced its

[14] PPROA has not claimed that 68 O.S.2001 § 2368, which sets a lower income threshold for requiring nonresidents to file Oklahoma tax returns than the income threshold for residents, is unconstitutional.

view that the statute should be amended to require taxes on royalties to be withheld from payments to all interest owners, regardless of residence. This statement suggests that the burden of filing returns to claim refunded taxes is not a significant hindrance.

¶ 15 An Oklahoma Attorney General's Opinion has previously addressed the constitutionality of the group of statutes at issue here.[15] As noted above, a tax on oil and gas income produced in Oklahoma is constitutional. *Alani, supra; Shaffer, supra.*[16] The Attorney General's Opinion determined that the withholding statute was constitutional based on the holding of *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920).

¶ 16 In *Travis,* the United States Supreme Court approved a New York statute which directed employers to withhold income taxes from the wages of employees who worked in New York but lived outside the state. At that time New York did not have a similar withholding statute affecting the wages of its residents. The

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[15] That opinion, 2000 OK AG 62, concluded that § 2385.26 does not violate the Privileges and Immunities Clause or the Equal Protection Clause. It did not address the Commerce Clause. Attorney General opinions are persuasive authority. *National Cowboy Hall of Fame & Western Heritage Ctr. v. State ex rel. Ok. Human Rights Comm.*, 1978 OK 76, 579 P.2d 1276; *McMullan v. County Bd. of Tax Roll Corrs.*, 2005 OK CIV APP 61, 119 P.3d 781.

[16] The tax on oil and gas royalties is based on the situs of the producing property, and not on the place of residence of the interest owner. 68 O.S.2001 § 2358(A)(4)(a).

court did not address the application of the Commerce Clause because that claim had been abandoned in the certiorari proceedings,[17] but the court found the statute was constitutionally sound under both the Privileges and Immunities Clause and the Equal Protection Clause.

¶ 17 In *Travis,* the court noted its holding in *Shaffer,* issued the same day, which approved states taxing nonresidents for income earned in the taxing state. 252 U.S. at 75. The court noted that taxes generally were collectible through garnishment or withholding. As to withholding taxes only from nonresident earners, the court found no actual discrimination because the tax owed was the same for residents and nonresidents, regardless of the collection method. *Id.* at 76. In *Shaffer* the court approved charging nonresidents a tax "of like character and not more onerous in effect" than taxes charged to residents for income earned in the taxing state. The *Travis* court concluded the only difference in requiring withholding as to certain taxpayers was in the method of collecting the equal tax.[18]

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[17] 252 U.S. at 76.

[18] That withholding is not a tax, but a method of collection has been reaffirmed since *Travis.* In *Baral v. U.S.,* 528 U.S. 431, 120 S.Ct. 1006, 145 L.Ed.2d 949 (2000) (a case not directly involving the issue of tax withholding), the Supreme Court referred to withholding as "garden variety collection of income tax," 528 U.S. at 433, 120 S.Ct. at 1007, and further explained "withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax." 528

(Continued on following page)

U.S. at 436, 120 S.Ct. at 1009. The court noted that the Internal Revenue Code section at issue there referred to withheld taxes and estimated tax payments both as prepaid income taxes. 528 U.S. at 437, 120 S.Ct. at 1010, citing 26 U.S.C. § 6513. Much earlier, the Supreme Court had announced that "it is of the utmost importance to all of them [the states] that *the modes adopted to enforce the taxes levied* should be interfered with as little as possible." *Dows v. Chicago,* 78 U.S. 108, 11 Wall. 108, 20 L.Ed. 65 (1871) (Emphasis added) (Decision holding that equity will not enjoin tax collection efforts where remedy at law is available).

The 9th Circuit Court of Appeals has explained the utility of collecting taxes by withholding the taxes before receipt by the taxpayer:

> The withholding provisions here are merely a collection adjunct of an otherwise valid tax. We think no objective of Congress, whether evidenced by the express language of the statutes relating to seamen's wages, or implied from its occupation of this field of legislation, can be said to run counter to the policy which would recognize the taxing power of the Territory.
>
> Admittedly these collection provisions work some hardship and produce annoyances. No one has yet devised a painless method of tax collection. The withholding device, though of but recent contrivance for use in collecting from wage earners, is so efficient for this purpose as to have become an essential aspect of any modern income tax law. When Congress, as we have said, occupied the field of legislation relating to the protection of seamen in the collection of their wages, it was not then entering any field relating to the liability of seamen for taxes, or the means of collecting such taxes. We deal here with a different field than that covered by the Congressional enactments. The payment of taxes is not included in those things from which Congress undertook to protect the seaman.

Alaska SS Co. v. Mullaney, 12 Alaska 594, 180 F.2d 805 (9th Cir.1950).

¶ 18 The *Travis* court held that the withholding statute at issue did not "increase the burden of the tax upon nonresidents, but merely recognize(d) the fact that as to them the state imposes no personal liability, and hence adopt(ed) a convenient substitute for it." 252 U.S. at 76, 40 S.Ct. at 230. The court indicated that the state had adopted a reasonable method to ensure collection of income taxes from nonresidents, and concluded that a statute employing a different collection method for nonresidents, but which does not tax nonresidents at a different rate than residents, does not violate the Equal Protection or Privileges and Immunities Clauses.

¶ 19 Since *Travis,* the Supreme Court has further addressed state tax regulations classifying on the basis of residency under the Privileges and Immunities Clause. In *Lunding v. New York Tax Appeals Tribunal,* 522 U.S. 287, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998), nonresident taxpayers challenged the constitutionality of a New York statute which allowed state residents to claim an income tax deduction for alimony paid, but denied that deduction to nonresidents. In *Lunding,* the court reiterated the *Shaffer* holding that nonresidents may be required to pay taxes "not more onerous in effect" than those imposed on state residents in the same circumstances, but the court held that nevertheless, "as a practical matter, the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents of a particular (s)tate." 522 U.S. at 297. The court recognized that different

treatment of residents and nonresidents in state tax laws are judged by their practical effect, rather than by their form. *Id.* The court explained that in response to a challenge to a state tax law which treats residents and nonresidents differently, the state must show first, a "substantial reason" for the difference in treatment, and second, that the different treatment bears a "substantial relationship" to the stated objective. *Id.* at 298 citing *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 284, 105 S.Ct. 1272, 1278, 84 L.Ed.2d 205 (1985).

¶ 20 In this case, OTC's stated reason for the different treatment is that it is easier to secure payment of taxes on royalties paid to out of state interest owners by withholding the taxes before the income leaves the state. PPROA's response is that OTC has jurisdiction over nonresident royalty owners so that withholding is unnecessary; PPROA also asserts that OTC is able to secure payment by imposing liens against nonresidents' property. The *Alani* decision, discussed above, shows the litigation necessary to secure payment from nonresidents who fail to file Oklahoma returns. Avoidance of that burden and expense is a substantial reason for the different treatment; directing operators to withhold the taxes before the royalties leave the state necessarily bears a substantial relationship to the state's objective. The fact that the statute at issue satisfies the test enunciated in *Lunding,* along with the fact that the statute does not involve unequal taxing, but rather only a difference in collection method (a long-approved difference), leads to our

conclusion that § 2385.26 does not violate to Privileges and Immunities Clause as a matter of law.

¶ 21 In its Equal Protection claim, PPROA notes the Supreme Court requires a state to show a rational basis for classifying on the basis of residency, and that such a classification must be reasonable, not arbitrary, and must rest on a ground that has a fair and substantial relation to the goal of the statute, citing *U.S. Railroad Retirement Board v. Fritz,* 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980). In reviewing a classification for a rational basis, a legislative choice may be based on rational speculation unsupported by evidence. *Schutz v. Thorne,* 415 F.3d 1128, 1136 (10thCir.2005), citing *FCC v. Beach Comm.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). PPROA argues that OTC has offered *no* rational basis for its different treatment of non-residents under § 2385.26. PPROA acknowledges, however, that OTC's stated rationale for the withholding statute is to ensure taxes on the royalty income are collected before the income leaves the state. PPROA again argues this asserted purpose is without merit because OTC is able to file liens or suits to recover unpaid taxes. We find the State's interest in collecting taxes on royalty income before the income leaves Oklahoma provides a rational basis for the classification based on residence in § 2385.26. The statute does not violate the Equal Protection Clause as a matter of law.

¶ 22 PPROA's remaining claim is that § 2385.26 burdens interstate commerce. PPROA asserts that

the "dormant commerce clause"[19] bars states from passing laws which interfere with interstate commerce. "(A) state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause." *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266, 285, 107 S.Ct. 2829, 2841, 97 L.Ed.2d 226 (1987). PPROA claims that a law overtly blocking interstate commerce at the state's borders is almost *per se* invalid and invokes the strictest scrutiny, citing *Dorrance v. McCarthy,* 957 F.2d 761 (10th Cir.(Wyo.)1992).

¶ 23 In *Dorrance,* the Tenth Circuit Court of Appeals explained the analysis used to determine whether a state statute violates the dormant Commerce Clause:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of

[19] The Commerce Clause is the source of constitutional limits on the states' ability to engage in economic protectionism through regulation and taxation of interstate commerce; this implied restriction on *state* regulation of interstate commerce is known as the negative or "dormant commerce clause." *Mt. Hood Beverage Co. v. Constellation Brands, Inc.,* 63 P.3d 779 (Wash.2003).

> degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. The person challenging a statute that regulates evenhandedly bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest.
>
> By contrast, if a statute discriminates against interstate commerce either on its face or in its practical effect, it is subject to the strictest scrutiny, and the burden shifts to the governmental body to prove both the legitimacy of the purported local interest and the lack of alternative means to further the local interest with less impact on interstate commerce. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.

957 F.2d at 763. (Citations omitted). See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

¶ 24 In *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), the Supreme Court outlined the history of its interpretation of the dormant Commerce Clause's limitations on the states' power to tax. The court noted that its jurisprudence had evolved to a four pronged test, such that it would sustain a state tax against a Commerce Clause

challenge if the tax (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state. 504 U.S. at 311.

¶ 25 The statute at issue in this case does not discriminate on its face because, although it directs withholding only as to nonresidents, it also grants nonresidents the right to a credit or refund of any amount withheld that exceeds the taxes due. And, the burden on interstate commerce caused by a particular tax collection method is only incidental, particularly where many state residents must pay quarterly tax estimates and the taxes withheld from nonresidents are paid quarterly.[20] Therefore under *Dorrance,* we would look to whether the burden on commerce caused by withholding the tax is clearly excessive in relation to the local interest at stake.

¶ 26 However, the essential distinction between *Dorrance* and *Quill* (and other cases involving state tax laws challenged on Commerce Clause grounds) is that the statute PPROA challenges *does not impose a tax,* but instead directs a method of collecting a tax. PPROA has not challenged the tax to which the withholding statute applies, which as noted above

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[20] The Oklahoma Tax Code provides, with exceptions, that if a taxpayer's tax liability is reasonably expected to be at least $500 more than the amount withheld from the taxpayer's wages, the taxpayer must make quarterly estimated tax payments. 68 O.S.2001 § 2385.7; 68 O.S.2001 § 2385.9.

applies equally to residents and nonresidents alike. Indeed, at oral argument, PPROA conceded it had not found any cases addressing a tax withholding statute in the context of a Commerce Clause violation, nor have we found such a case.[21] Additionally, we have reviewed numerous statutes from other states which require withholding taxes from nonresidents in various types of transactions and found no cases addressing the constitutionality of those statutes.

¶ 27 Statutes requiring withholding of taxes from certain groups, including nonresidents of the taxing state, have long been upheld so long as the tax itself is not more onerous than that applicable to those not subject to withholding. That withholding may result in the temporary loss of use of the withheld amounts has not been found to be a constitutionally protected interest (at least so long as the amount withheld is

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[21] In *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975), a case involving a constitutional challenge to New Hampshire's commuter tax, the court noted that New Hampshire law required the tax at issue to be withheld from the wages of nonresidents who commuted into New Hampshire for work. In footnote 4, the court recognized that *withholding in an amount greater than the current tax rate* deprived nonresidents of the use value of the excess withholding. The court determined only that such loss established the nonresidents' status as parties adversely affected for standing purposes. The court did not address the issue of whether the withholding provision was unconstitutional. In that case, the challenge was to the tax, not to the collection method. The withholding amount in § 2385.26 has been amended to be less than the maximum tax rate, so that excess withholding of taxes on royalty income is not a significant factor in this case.

not greater than the tax rates, as suggested by *Austin, supra*). OTC has enunciated a legitimate local purpose for the classification in § 2385.26, and neither PPROA nor Cambridge has shown that the burden on interstate commerce is more than incidental; certainly nothing in the record suggests the burden is clearly excessive compared to the local interest. For these reasons, we find the statute at issue here does not violate the Commerce Clause as a matter of law. And, as noted above, it likewise does not offend the Equal Protection Clause or the Privileges and Immunities Clause. OTC is entitled to judgment as a matter of law on the undisputed material facts.

AFFIRMED

HANSEN, P.J., and BELL, J., concur.

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

PANHANDLE PRODUCER'S AND ROYALTY OWNER'S ASSOCIATION, CAMBRIDGE PRODUCERS, LTD., and THOMAS R. CAMBRIDGE, *Plaintiffs,* v. OKLAHOMA TAX COMMISSION and THOMAS E. KEMP, JR.; JERRY B. JOHNSON; And CONSTANCE IRBY; TAX COMMISSIONERS, all in their official capacities, *Defendants.*	Case No. CJ-2005-9120

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 19, 2006)

NOW on this 6th day of October, 2006, this matter comes on for hearing on the Plaintiffs', Panhandle Producer's and Royalty Owners Association, Cambridge Producers, Ltd., and Thomas R. Cambridge Motion for Summary Judgment and on the Defendants', Oklahoma Tax Commission, Thomas E. Kemp, Jr., Jerry B. Johnson and Constance Irby, Motion for Summary Judgment. The Court, being fully advised in the premises and

having heard the arguments and representations of counsel, FINDS that the Plaintiffs' motion should be denied and that the Defendant's Motion should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary judgment is DENIED and Defendants' Motion for Summary Judgment is SUSTAINED and that judgment is entered for the Defendants herein.

DATED this 19th day of October, 2006.

DANIEL L. OWENS
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Judge of the District Court

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IN THE DISTRICT COURT OF OKLAHOMA
COUNTY IN THE STATE OF OKLAHOMA

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD.; and THOMAS R. CAMBRIDGE, Plaintiffs, v. OKLAHOMA TAX COMMISSION; and THOMAS E. KEMP; JERRY B. JOHNSON; and CONNIE IRBY, Tax Commissioners, all in their official capacities, Defendants.	)	Case No. CJ-2005-9120

SECOND AMENDED PETITION

(Filed Jun. 27, 2006)

Plaintiffs Panhandle Producers and Royalty Owners Association, Cambridge Producers, Ltd., and Thomas R. Cambridge, by and through their attorneys, Harlan Hentges and Mountain States Legal Foundation, file this Second Amended Petition against the above-named Defendants and allege the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction under 68 O.S. §226, 42 U.S.C. § 1983, and 12 O.S. § 1651, *et seq.*,

over Plaintiffs' claims for violation of the United States Constitution.

2. Venue rests properly in this Court pursuant to 12 O.S. § 133, in that Defendants officiate from Oklahoma County and the actions being challenged are taking place in Oklahoma County.

PARTIES

3. Plaintiff Panhandle Producers and Royalty Owners Association ("PPROA") is a non-profit trade association that is organized under the law of the State of Texas and operates from its principal place of business in Amarillo, Texas. Plaintiff Cambridge Producers, Ltd. ("Producers"), owns oil and gas royalties in Oklahoma, operates from its principal place of business in Amarillo, Texas, and is a member of PPROA. Plaintiff Thomas R. Cambridge ("Mr. Cambridge") is a General Partner of Producers.

4. Defendant Oklahoma Tax Commission ("OTC") is a political subdivision within the State of Oklahoma and is responsible for implementation of Oklahoma taxation.

5. Defendants Thomas E. Kemp, Jerry B. Johnson, and Connie Irby are duly seated members of the OTC.

6. Defendants Kemp, Johnson, and Irby implement 68 O.S. 2385.25-28, which causes injury to Plaintiffs. Defendants' conduct was an official decision by a duly seated body carrying out State statutes.

STATEMENT OF FACTS

7. The PPROA is a trade association that has as its members independent petroleum producers, service companies, and royalty owners in Texas, Oklahoma, and Kansas. The PPROA provides assistance to its members by providing information, meeting with legislators and agencies, drafting and commenting on legislation and agency rules, and, when necessary, participating in litigation in federal and State courts to protect its members' interests. Producers owns oil royalty interests in Oklahoma and operates from Amarillo, Texas, its primary place of business. Mr. Cambridge is General Partner of Producers.

8. Effective July 1, 2001, the State of Oklahoma implemented a disparate tax-withholding statute, 68 O.S. 2385.25-28, which, *inter alia,* imposes disparate withholding requirements on non-resident oil and gas royalty owners as compared to their counterparts with Oklahoma residency status.

9. The withholding rate imposed on those who are not residents of the State of Oklahoma is 6.75 percent of the gross royalty that must be remitted to the OTC on a quarterly basis.

10. Excepted from the withholding requirements of 68 O.S. 2385.25-28 are current or permanent residents of the State of Oklahoma, State and federal governments and their political subdivisions, charitable institutions, and federally recognized Indian tribes.

11. The PPROA has numerous members who own royalty interests on properties located within the State of Oklahoma but reside outside of the State and are, therefore, subject to the withholding tax. Producers is subject to the withholding tax. Mr. Cambridge is subject to the withholding tax. Neither PPROA, Producers, nor Mr. Cambridge are statutorily or otherwise excepted from the withholding requirements.

FIRST CLAIM FOR RELIEF
(Violation of Privileges and Immunities)

12. The PPROA, Producers, and Mr. Cambridge re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 11 of this Second Amended Petition.

13. Amendment XIV of the United States Constitution provides "No State [or political subdivision thereof] shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Article IV, Section 2, of the United States Constitution provides that "The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the several States."

14. Members of the PPROA who reside outside of the State of Oklahoma but who own royalty interests in Oklahoma, Producers, and Mr. Cambridge have constitutionally protected privileges and immunities currently infringed upon by Oklahoma's disparate tax-withholding statute.

SECOND CLAIM FOR RELIEF
(Violation of Equal Protection Rights)

15. The PPROA, Producers, and Mr. Cambridge re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 14 of this Second Amended Petition.

16. The PPROA and its members, Producers, and Mr. Cambridge have a constitutional right to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

17. The disparate tax-withholding statute of the State of Oklahoma deprives members of the PPROA, Producers, and Mr. Cambridge of their right to equal protection because, *inter alia,* it deprives those who reside outside of the State of Oklahoma of the present use of their money in a way it does not for those who reside within the State of Oklahoma.

THIRD CLAIM FOR RELIEF
(Violation of Commerce Clause)

18. The PPROA, Producers, and Mr. Cambridge re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 17 of this Second Amended Petition.

19. The State of Oklahoma's disparate tax-withholding statute violates the Commerce Clause of the United States Constitution because it unreasonably burdens interstate commerce by discriminating

against out-of-state royalty owner members of the PPROA, Producers, and Mr. Cambridge.

FOURTH CLAIM FOR RELIEF
(Violation of 42 U.S.C. § 1983)

20. The PPROA, Producers, and Mr. Cambridge re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 19 of this Second Amended Petition.

21. In carrying out 68 O.S. 2385.25-28, Defendants violated Article IV, Section 2, of the United States Constitution, which provides that "The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the several States." Those members of the PPROA who reside outside of the State of Oklahoma but who own royalty interests within the State, Producers, and Mr. Cambridge have constitutionally protected privileges and immunities currently infringed upon by the State of Oklahoma's disparate tax-withholding statute.

22. In carrying out 68 O.S. 2385.25-28, Defendants violated the constitutional right of the PPROA and its members, Producers, and Mr. Cambridge to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution insofar as Oklahoma's disparate tax-withholding statute deprives members of the PPROA, Producers, and Mr. Cambridge of their right to equal protection because, *inter alita,* it burdens those who

reside outside the State of Oklahoma in a way it does not burden those who reside within the State.

23. In carrying out 68 O.S. 2385.25-28, Defendants violated the constitutional rights of the PPROA and its members, Producers, and Mr. Cambridge because Oklahoma's disparate tax-withholding statute violates the Commerce Clause of the United States Constitution and unreasonably burdens interstate commerce by discriminating against out-of-state royalty owner members of the PPROA, Producers, and Mr. Cambridge.

24. Defendants' actions in carrying out 68 O.S. 2385.25-28 were under color of state law and deprived the PPROA and its members, Producers, and Mr. Cambridge of "rights, privileges, or immunities secured by the Constitution and laws" in violation of 42 U.S.C. § 1983.

25. The PPROA, Producers, and Mr. Cambridge are entitled to a declaratory judgment that Defendants violated 42 U.S.C. § 1983 and to an injunction prohibiting Defendants from enforcing 68 O.S. 2385.25-28.

PRAYER

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that 68 O.S. 2385.25-28 deprives the members of the PPROA, Producers, and Mr. Cambridge of privileges and immunities under the United

States Constitution and enjoin Defendants from enforcing 68 O.S. 2385.25-28;

B. Declare that 68 O.S. 2385.25-28 deprives the members of the PPROA, Producers, and Mr. Cambridge of equal protection under the United States Constitution and enjoin Defendants from enforcing 68 O.S. 2385.25-28.

C. Declare that 68 O.S. 2385.25-28 violates the Commerce Clause of the U.S. Constitution and enjoin Defendants from enforcing 68 O.S. 2385.25-28.

D. Declare that Defendants violates 42 U.S.C. § 1983 and enjoin Defendants from enforcing 68 O.S. 2385.25-28.

E. Award the PPROA, Producers, and Mr. Cambridge their attorneys' fees, costs, and expenses in accordance with law, including but not limited to 42 U.S.C. § 1988.

F. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 27th day of June, 2006.

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No. 07-451

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD.; and THOMAS R. CAMBRIDGE,

Petitioners,

v.

OKLAHOMA TAX COMMISSION; and THOMAS E. KEMP, JR., JERRY B. JOHNSON, and CONSTANCE IRBY, tax commissioners, all in their official capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Petition for Writ of Certiorari be denied in a privileges-and-immunity attack against Oklahoma's income tax collection regimen that requires withholding from oil and gas royalty income that is leaving the State of Oklahoma, where long-standing (and rarely challenged) jurisprudence approves of withholding from nonresidents?

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RESTATEMENT OF THE CASE

Oklahoma has a state income tax system, which includes taxes on income derived from in-state oil and gas royalty payments. The Oklahoma Income Tax Code withholding provisions are found at 68 O.S. 2001 & Supp. 2007, §§ 2385.1-2385.28. Under the Oklahoma law, each remitter ("any person who distributes revenue to royalty interest owners") must deduct and withhold from each payment being made to any royalty interest owner an amount equal to five percent of the gross amount payable to the owner for oil and gas produced in this State. *Id.* § 2385.25(2); *see id.* § 2385.26(A). For the purpose of the withholding statute, "royalty interest owner" is defined as an individual who owns a non-working interest in oil or gas production. *See id.* § 2385.25(3). Royalty interest owners from whom taxes are withheld and who file an Oklahoma income tax return are entitled to a credit against the tax as shown on the return in the amount withheld by the remitter. *See id.* § 2385.26(C). If the amount withheld is greater than the tax due, the taxpayer filing the return is entitled to a refund in the amount of the overpayment. *See id.* Remitters are required to pay the amounts withheld from the royalty owners to the Oklahoma Tax Commission on a quarterly basis for deposit in the Income Tax Withholding Fund. *See id.* § 2385.27(A), (E).

The obligation to deduct and withhold does not apply to those payments made to: "1. Current or permanent residents of Oklahoma; 2. The United States, this state or any state or federal agency or

political subdivision; 3. Any charitable institution; or 4. Any federally recognized Indian tribe." 68 O.S. Supp. 2007, § 2385.26(B). State and federal governments, charitable institutions, and Indian tribes are not subject to State income tax. *See id.* §§ 2353(12), 2355; 68 O.S. 2001, § 2359. "Current or permanent residents" are subject to an identical tax on income, including royalty payments; however, under the withholding exemption, the tax is not withheld from their royalty payments by the remitter, but rather is due on a quarterly basis or at the time the yearly return is filed. *See* 68 O.S. Supp. 2007, §§ 2358(A)(4)(a), 2368, 2375, 68 O.S. 2001 §§ 2385.7, 2385.9.

All royalty proceeds from Oklahoma properties are subject to Oklahoma income tax, irrespective of the residency of the mineral owner. Income tax is imposed upon the "Oklahoma taxable income" of every resident taxpayer or nonresident taxpayer. *See* 68 O.S. Supp. 2007 § 2355(A). "Oklahoma taxable income" means taxable income reportable to the federal government under the Internal Revenue Code, adjusted as provided in the Oklahoma Income Tax Code. *See id.* § 2353(12). Income from oil and gas properties is allocated to the situs of such property. *See id.* § 2358(A)(4)(a). Nonresident taxpayers must report income attributable to the ownership of any interest in real or personal property in Oklahoma. *See id.* § 2362. Oklahoma's imposition of income tax on income of nonresidents from oil and gas produced from Oklahoma properties was upheld in *Shaffer v. Carter*, 252 U.S. 37 (1920). This Court noted that it

had always recognized rights of the States to exercise the widest liberty with respect to imposition of taxes (*See id.* at 51) and that just as a State may impose general income taxes upon its own citizens, it may levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the State. *See id.* at 52.

In the instant matter nonresident taxpayers sued in state court and have been denied relief through the highest court in Oklahoma. They now petition for discretionary review challenging the withholding procedures under the privileges and immunity clause. U.S. Const. art. IV, § 2 cl. 1.

REASONS FOR DENYING WRIT

THE RARELY CHALLENGED ISSUE OF INCOME TAX WITHHOLDING FROM NONRESIDENT TAXPAYERS DOES NOT INVOLVE A CONFLICT OF AUTHORITY, AS ALL TRIBUNALS ARE IN ACCORD WITH LONGSTANDING JURISPRUDENCE ANNOUNCED BY THIS COURT IN *TRAVIS V. YALE & TOWNE MFG. CO.*, 252 U.S. 60 (1920).

Oklahoma is one of many States which have determined that withholding at the source of income is appropriate when it comes to nonresident taxpayers. Around the country state income tax withholding from nonresidents is required for various transactions

and disbursements. These include nonresident sale of real property, nonresident contractor payments, nonresident entertainer payments and disbursements from pass-through entities (such as partnerships, "S" corporations, LLCs and trusts) where such payments are made to out-of-state taxpayers.[1] Oklahoma, along with the royalty withholding statutes challenged in this instant matter, also requires withholding with respect to pass-through entities.[2] 68 O.S. Supp. 2007, §§ 2385.29-2385.31. Thus, it is fair to suggest that non-wage withholding, which sets aside funds that are headed out of state to nonresidents, is reasonably commonplace around the country.

There is a paucity of cases from these many jurisdictions that have reported challenges to the

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[1] See for example state statutes requiring non-wage withholding for non-resident disbursements: California, Cal. Rev. & Tax. Cd. § 18662(a)-(c) (general withholding statutes); Delaware, 30 Del. Code Ann. § 1158 (Subchapter S corporations); Hawaii, Haw. Rev. Stat. § 235-68(b) (sale of real property); Maryland, Md. Code Ann. Tax-Gen. § 13-803; Michigan, Mich. Comp. Laws Ann. § 206.351(2) (pass-through entities); Minnesota, Minn. Stat. § 290.9201, Subd. 7 (entertainer withholding); Mississippi, Miss. Code Ann. § 27-7-308 (real property); North Carolina, N.C. Gen. Stat. § 105-163.3(a) (contractor withholding); Ohio, Ohio Rev. Code Ann. § 5747.40 (pass-through entities); Pennsylvania, Pa. Stat. Ann. 72 § 7324(a) (S corporations and pass-through entities); South Carolina, S.C. Code Ann. § 12-8-540 (withholding for rents and royalty payments); Vermont, Vt. Stat. Ann. 32 § 5847(a) (real estate); and West Virginia, W. Va. Code § 11-21-71a (pass-through entities).

[2] The Oklahoma withholding statute for pass-through entities has not been challenged and remains current and valid.

practice of withholding from nonresident taxpayers. The issue was resolved by this Court eighty-seven years ago by *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). It was held:

> The contention that an unconstitutional discrimination against noncitizens . . . [by] confining the withholding at source to the income of nonresidents is unsubstantial. That provision does not in any wise increase the burden of the tax upon nonresidents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it. *Id.* at 72

Since that time there has been little consideration given to revisiting the issue. In 1967 an attack on "disparate" withholding was rejected by the South Carolina Supreme Court in *Peoples National Bank v. South Carolina Tax Commission*, 156 S.E. 2d 769 (S.C. 1967) (concerning trust distributions). As that court noted, the legitimate purpose of the withholding statute "was to assure the collection of income taxes due to the State on income distributable to nonresident beneficiaries, before the funds should be sent beyond the jurisdiction of the State." *Id.* at 191. In 1990, the issue was again rejected in South Carolina upon Equal Protection and Privileges and Immunities grounds. *S.C. Dept. Of Rev. Commission Decision*, 90-4 (Jan. 23, 1990) (administrative ruling). Appendix 1. In 1993 the issue was rejected in Michigan on equal protection grounds. *See Molter v. Department of Treasury*, 505 N.W. 2d 244, 253 (Mich. 1993), concerning

income tax withheld only from nonresidents on payment of deferred compensation. That court concluded:

> Because the state income tax applies equally to all former residents who receive deferred compensation, we hold that plaintiff's equal protection rights have not been violated by the state's practice of withholding income taxes from his deferred compensation plan distributions. *Id.* at 253.

In 2007 the issue was again rejected in this instant case.[3]

The Privileges and Immunities Clause provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2 cl. 1. One of the rights intended to be secured by this provision is that a citizen of one State may carry on business in another State without being subjected to taxes more onerous than the latter State's own citizens. *See Shaffer*, 252 U.S. at 56.

In the statutes under review, nonresidents are not taxed more heavily than residents; the difference in treatment is only in the means of collecting the tax. The income tax is withheld from nonresident taxpayers' royalty payments, whereas Oklahoma taxpayers pay their tax in quarterly estimates or with

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[3] Petitioners have abandoned their equal protection and commerce clause claims in their petition.

their yearly tax return. Income taxes normally are assessed at the source, the moment the income is received by the taxpayer. *See, e.g., Begier v. I.R.S.*, 496 U.S. 53, 61 (1990). "Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax." *Baral v. U.S.*, 528 U.S. 431, 436 (2000).

As noted, a difference in withholding requirements between residents and nonresidents was approved against a Privileges and Immunities Clause challenge in *Travis*, where the issue was whether New York law violated the Privileges and Immunities Clause by discriminating against nonresidents by requiring employers to withhold the tax from nonresidents' salaries, but not residents' salaries.

In *Travis* this Court noted that the law did not increase the burden of tax upon nonresidents, but merely recognized the fact that as to them a state imposed no personal liability, and hence adopted a convenient substitute for it. *See* 252 U.S. at 76. The adoption of a withholding requirement for nonresident royalty owners is justified by the fact that collection of the tax from nonresidents is more difficult than collecting tax from residents. Withholding tax from nonresidents' mineral interest proceeds is a rational means of addressing this problem.

The petition should be denied.

CONCLUSION

The Petition of Certiorari should be denied as the issue, which has been settled for over eight decades, has raised little attention through the years and has produced no genuine conflicts in authority.

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APPENDIX A

Commission Decision 90-4

Case Information:

Docket/Court: 90-4, South Carolina Dept. of Rev. Commission Decisions

Date Issued: 01/23/1990

Tax Type(s): Corporate Income Tax

OPINION

In Re:

A Finding Concerning A Dispute Over Withholding On The Sale Proceeds From Real Estate Sold By XYZ

FINDINGS OF FACT

XYZ is a nonresident of South Carolina who, until July 31, 1989, was the owner of property located at X, South Carolina. On that date, she sold the property to DFG. Act 189, Part II, Section 55(b) of the Acts of 1989, required the DFGs, as the buyers, to withhold from the proceeds payable to the nonresident seller 7% of the proceeds of the sale. XYZ objected on the grounds that the provisions of Section 55(b) are violations of the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution. Based on these assertions, XYZ sought a refund from the Office Services Division. After the refund denial, the matter came to us.

CONCLUSIONS OF LAW

Effective July 1, 1989, Act 189, Part II, Section 55(b), required every person:

> "Making payment to a nonresident of the proceeds of the sale of real property and tangible personal property shall deduct and withhold on the payments an amount equal to seven percent of the total payment to individuals and five percent of the total payment to corporations . . . "

This statute is a withholding statute designed to apply the withheld amount to the taxpayer's income tax liability for the tax year. Here, the tax year from XYZ ended December 31, 1989. The issue of whether a refund is due is now somewhat moot since the withheld amount can be applied to the 1989 income tax liability. Any excess withholding will be refunded. Thus the issuance of a refund is premature here until the 1989 return is filed.

We further note another reason why we are unable to grant a refund of the withholding tax involved. The only challenge in the matter before us is the constitutional challenge based on the Equal Protection Clause and the Privileges and Immunities Clause. We have no power to declare a statute unconstitutional. (*See South Carolina Tax Commission v. South Carolina Tax Board of Review*, 278 S.C. 566, 299 S.E.2d 489 (1983).) Nonetheless, we set forth our views on why the statute is constitutional.

In taxation, the Equal Protection Clause requires a consideration of three elements. The classification subject to tax cannot be arbitrary, the classification must be based upon a reasonable difference between the classes, and those within the class must be treated the same. *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 109 S.Ct. 633 (1989). Here, the classification is not arbitrary and is based on a reasonable difference between the classes. The class is based on the rational need for the state to collect income tax from taxpayers who, as nonresidents, dispose of assets in the state and thus remove from the state a potential avenue for the collection of the tax generated by the sale. The reasonable difference between residents and nonresidents is the difficulty in collecting tax on a transaction where the funds or assets generated from the transaction have been removed from the state.

> "The practical difficulties involved in attempting to collect the tax due, after out of state distribution of the funds, are apparent." *Peoples National Bank v. South Carolina Tax Commission*, 250 S.C. 187, 156 S.E.2d 769 (1967).

Thus, a classification based on nonresident's removing assets from the state is not only not arbitrary, but is in fact a reasonable and approved method in this state. Finally, it is without dispute that all members of the class are treated the same in that all nonresidents are subject to the withholding requirements. Based on the above, we submit the statute is not in

violation of the Equal Protection Clause of the United States Constitution.

We further believe the statute does not violate the Privileges and Immunities Clause. There is no automatic violation of that clause based solely upon showing that one group is required to perform a duty not imposed upon another group. Rather, if the state has a legitimate object it seeks to accomplish and if the duty has a substantial relationship to that object, the statute is constitutional. *New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). As our Court said in *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386, 388 (1984):

> "We must next address the more difficult question of whether substantial reasons justify the discrimination and whether the degree of discrimination bears a close relationship to those reasons . . . "

In the case of the withholding on nonresidents, substantial reasons exist for imposing the withholding requirement and further the withholding requirement is closely tailored to accomplish the objective sought by the statute. A nonresident selling property in South Carolina may effectively remove any ability of the state to collect the tax generated from such a sale since the assets are removed from the state and are no longer subject to levy or attachment. A resident, however, is subject to the full authority of the Commission's levy power and his presence in the state provides a ready avenue for enforcement of any resulting tax liability.

The withholding requirement is closely tailored to accomplish the objective. The withholding requirements assures that assets are available from which the taxpayer's liability may be satisfied. Further, the withholding is not a permanent condition. Rather, it is only a temporary situation since once the taxpayer files the South Carolina return setting forth the South Carolina tax liability, any excess withholding is refunded to the taxpayer. Such a procedure does not unduly infringe upon the Privileges and Immunities Clause.

We reiterate that the refund issue is now a moot question since a refund is available to the extent it exceeds the 1989 income tax liability. However, since the constitutional issues attempted to be raised are significant ones, we have taken this opportunity to express our view as to why the statute is constitutional. Based on the above, the refund claim is denied.

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION

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(3)

No. 07-451

FILED

NOV 13 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD.; and THOMAS R. CAMBRIDGE,

Petitioners,

v.

OKLAHOMA TAX COMMISSION; and THOMAS E. KELP, JR., JERRY B. JOHNSTON, and CONSTANCE IRBY, tax commissioners, all in their official capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

The argument proffered by the Oklahoma Tax Commission ("OTC") in its Brief in Opposition rests on four primary assumptions, none of which is valid.

I. A TAX SCHEME THAT IS "REASONABLY COMMONPLACE AROUND THE COUNTRY" IS NOT, WITHOUT MORE, CONSTITUTIONAL.

The OTC contends that the challenged sections of the Oklahoma tax code, specifically 68 Okla. Stat. Ann. §§ 2385.1-2385.28, are constitutional because similar schemes are "reasonably commonplace around the country".[1] Br. in Opp. 4. The OTC then comments that the "paucity of cases" in which such "commonplace" tax schemes have been challenged is evidence that they conform to the Constitution. *Id.*

This Court regularly strikes down practices that have become "reasonably commonplace" around the country. In *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 486, 495 (1954), this Court unanimously struck down the "separate but equal" doctrine as contrary to the Equal Protection Clause notwithstanding that its use had become commonplace in school districts in states as geographically

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[1] In addition to those sections discussed in the Brief in Opposition, 68 Okla. Stat. Ann. § 2368(A) and § 2369 are also relevant to the Oklahoma tax withholding scheme.

and demographically diverse as Kansas, South Carolina, Virginia, and Delaware. More recently, in *Granholm v. Heald*, 544 U.S. 460 (2005), this Court held that bans on interstate, direct-to-consumer shipments of wine, which existed in nearly half of the States, were unconstitutional. *Id.* at 467-68, 493.

Ever since *Marbury v. Madison*, it has been the province of this Court to "say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (establishing this Court's power to review state court decisions). It is the duty of this Court to interpret the Constitution irrespective of popular support for or public attitudes regarding "reasonably commonplace" state statutes. *See, e.g., Chambers v. State of Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."); *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (describing the "countermajoritarian implications of judicial review" as "the protection [of] constitutional rights and liberties of individual citizens and minority groups. . . . ")). The OTC fails to acknowledge that the "commonplace" nature of a certain type of tax scheme does not render it constitutional if it does not, in fact, conform to the Constitution. It is precisely because such discriminatory, and hence unconstitutional, tax schemes are so

"commonplace" that this Court should grant *certiorari*.

II. WHETHER A WITHHOLDING STATUTE DEPRIVES NONRESIDENTS OF THE TIME VALUE OF MONEY WAS NOT ADDRESSED IN *TRAVIS*.

The OTC contends that "the practice of withholding from nonresident taxpayers" was resolved by this Court in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). Br. in Opp. 4-5. To the contrary, the *Travis* Court resolved the issue of whether withholding income taxes only from those upon whom "the state imposes no personal liability" in a manner that does not "in any wise increase the burden of the tax upon nonresidents" violates the Privileges and Immunities Clause of Article IV, § 2 of the U.S. Constitution. *Id.* at 76.

In *Travis*, a Connecticut company doing business in New York sued the comptroller of the State of New York alleging, *inter alia*, that a New York statute that required income tax withholding only of nonresidents violated the Privileges and Immunities Clause. *Id.* at 72-74. The company was particularly concerned that it would be compelled to withhold income otherwise payable to its employees who worked in New York, but who lived elsewhere, thereby subjecting the company to employee actions for reimbursement of the withheld money. *Id.* at 75. This Court ultimately upheld the constitutionality of such a withholding statute. *Id.* at 76.

The withholding statutes in Oklahoma, however, differs materially from the withholding statute in *Travis*. First, unlike the withholding statute in *Travis*, there is evidence that the Oklahoma tax scheme "increase[s] the burden of the tax upon nonresidents." Pet. 11-19 (discussing how the withholding tax deprives nonresidents of the time value of money).[2] Indeed, in *Travis*, there is no evidence that the time value of money was ever considered or even raised as an issue. Thus, *Travis* cannot be binding precedent on this issue. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5 (1974); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *United States v. More*, 7 U.S. (3 Cranch) 159 (1805) (Marshall, C. J.)).

Secondly, unlike the situation in *Travis*, Oklahoma does have "personal jurisdiction to assess and collect a tax" on a nonresidents' oil and gas royalty interest income "that is attributable to property within Oklahoma." *In re Income Tax Protest of Alani*, 2006 OK CIV APP 54, 135 P.3d 828, 833 (Okla. Civ. App. 2005).

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[2] The OTC, in its Brief in Opposition, did not contest that, because of the Oklahoma tax withholding scheme, nonresidents would suffer the deprivation of the time value of money.

Because the Court in *Travis* never addressed – much less resolved – the issue of whether a state withholding statute may deprive only nonresidents of the time value of money when a state has personal jurisdiction over certain income, the OTC's assumption that *Travis* resolves the issue here is unfounded. As a result, this Court should grant *certiorari* to determine the constitutionality of Oklahoma's discriminatory tax scheme.

III. THE DISCRIMINATORY BURDENS ON NONRESIDENTS ARE SUBSTANTIVE.

This Court has held that "where the question is whether a state taxing law contravenes rights secured by [the Privileges and Immunities Clause], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998).

Thus, in accordance with the Privileges and Immunities Clause, a nonresident may be compelled only "to pay taxes not more onerous in effect than those imposed under like circumstances upon the citizens of the . . . State." *Id.* at 297 (quoting *Shaffer v. Carter*, 252 U.S. 37, 56 (1920)).

Both the Oklahoma Court of Civil Appeals and the OTC wrongly conclude that "the difference in treatment is only in the means of collecting the tax." Br. in Opp. 6; *see also* App. 18-21. In fact, the Oklahoma tax

scheme substantively burdens nonresidents, and effects a "more onerous" burden upon nonresidents in two distinct ways.

First, nonresidents are substantively deprived of the time value of money as a direct result of the Oklahoma tax scheme, Pet. 11-18, a fact the OTC does not contest in its Brief in Opposition. Second, the Oklahoma tax scheme effects a "more onerous" burden on nonresidents by requiring them to file income tax returns to recoup their withheld monies. Pet. 17-19. This burden likely deters some from filing for a refund, thereby enriching the state's coffers with unclaimed refunds. Pet. 18.

These burdens are not derived merely from the "form, construction, or definition" of the Oklahoma tax scheme; instead, the scheme has the "practical operation and effect" of creating a "more onerous" burden on nonresidents. Thus, because the Oklahoma decision conflicts with this Court's decision in *Lunding*, this Court should grant *certiorari*.

IV. THE OKLAHOMA TAX SCHEME IS NOT CONSTITUTIONAL SIMPLY BECAUSE IT IS MORE "CONVENIENT" FOR OKLAHOMA.

The OTC, in the penultimate paragraph of its Brief in Opposition, concludes, based on *dicta* in *Travis*, that the "adoption of a withholding requirement for nonresident royalty owners is justified by the fact that collection of the tax from nonresidents is more difficult than collecting tax from residents."

Br. in Opp. 7. Assuming, *arguendo*, that this unsubstantiated allegation is true, it is not a basis for upholding the constitutionality of the tax scheme. In *I.N.S. v. Chadha*, which, incidentally, was decided more than sixty years after *Travis*, this Court held, "that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. 919, 944 (1983). Having already established that the Oklahoma tax scheme violates the Privileges and Immunities Clause, that it may be "more difficult" for Oklahoma to collect taxes from nonresidents is of no consequence.

CONCLUSION

Petitioners respectfully request that the Petition be granted.

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